employer. Order 53 of the Rules of the High Court 1980 cannot therefore be permitted for the enforcement of such private rights. Accordingly, I have come to the conclusion from the documentary evidence adduced in this application that the applicant has failed to produce sufficient evidence to sustain a prima facie case.

The application for leave is therefore dismissed.

Application dismissed.

Solicitors: *Lobo & Associates.*

Reported by *Prof Ahmad Ibrahim*

Public Prosecutor v Padi bin Abdullah

HIGH COURT (LABUAN) – CRIMINAL TRIAL NO 24 OF 1984
MOHAMAD NOOR J
18 NOVEMBER 1988

Criminal Law – Dangerous drugs – Trafficking in – Ambush laid after tip-off from agent provocateur – Accused caught red-handed– Whether statutory presumptions of possession and trafficking rebutted – Accused denied carrying bag of drugs – Accused's story not reasonably true – Dangerous Drugs Act 1952, ss 37(d), (da)(vi) & 39B(1)(a)

Criminal Law – Dangerous drugs – Trafficking in – Agent provocateur – Cannot be considered as accomplice – Evidence of agent provocateur to be admissible and treated like any other evidence from any ordinary witness – Dangerous Drugs Act 1952, s 40A

The accused was charged with trafficking in 856.1 gm of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The prosecution's case was that on 11 February 1984, the police was informed by PW5, an agent provocateur, that the accused wanted to sell ganja to him. Upon receipt of such information, the police decided to lay a trap and in pursuit of the plan, an ambush was laid when the accused was seen carrying a plastic bag walking towards the arranged place. The seized bag was opened on the spot and found to contain cannabis. In his defence, the accused denied carrying the plastic bag at the time of the arrest but alleged that PW5 was carrying it and when PW5 ran away after the ambush, PW5 threw the bag to him.

Held, convicting the accused:

(1) On the facts, it is clear that the accused was caught red-handed to have in his custody or under his control the bag which contained the drug. Under s 37(d) of the Act, he shall thus be deemed to have in his possession the drug and to have known the nature of such drug until the contrary is proved. Further, having regard to the quantum, by virtue of s 37(da)(vi) he shall be presumed to be trafficking in the drug until the contrary is proved.

(2) The court has no reason to doubt the truth of the testimonies of the members of the police party. With regard to PW5, he is not an accomplice since he had made himself an agent for the prosecution before the actual commission of the offence. Generally, the court is always wary in accepting the evidence of an agent provocateur but in this case, the legislature, under s 40A of the Act, had provided that the evidence of any agent provocateur shall be admissible and treated like any other evidence from any ordinary witness.

(3) The court did not consider the accused's story to be reasonably true or consistent with his innocence. The accused had not rebutted the statutory presumptions on the balance of probabilities.

[*Editorial Note*: The accused has appealed to the Supreme Court vide Criminal Appeal No 99 of 1988.]

Case referred to
1 *Sathasivam & Ors* v *PP* [1949] MLJ 71 (refd)

Legislation referred to
Dangerous Drugs Act 1952 ss 2, 37(d),(da)(vi), 39B(1)(a), 40A

Abdul Gani Patail (Deputy Public Prosecutor) for the Public Prosecutor.
PK Lim for the accused.

Cur Adv Vult

Mohamad Noor J: The accused was charged as follows:

> That you on the 12th day of February 1984, at about 9 pm, in front of the Ann Kwai Club, Jalan Kenanga, in the Federal Territory of Labuan, Malaysia, did traffic in a dangerous drug to wit 856.1 gm of cannabis on your own behalf and that you thereby committed an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) and punishable under s 39(2) of the said Act.

This is the case for the prosecution. On 11 February 1984, at about 7.30 pm the police was informed by PW5 that the accused wanted to sell ganja to him. Upon receipt of such information, the police decided to lay a trap. In pursuit thereof, a plan was made for PW5 to arrange for the sale to take place somewhere near Ann Kwai Club, Jalan Kenanga, Labuan. On 12 February 1984 at about 7 pm, a party of police officers, led by PW2, laid an ambush in front of Ann Kwai Club. Visibility was good. At about 9 pm, the accused and PW5 were seen walking abreast coming from the direction of Labuan Emporium and heading towards Ann Kwai Club. The accused was seen carrying a plastic bag. After a signal from PW5, the police party closed in and PW6 arrested the accused and seized the bag from him. PW5 ran away as planned. The bag was opened on the spot and found to contain cannabis, the subject matter of the charge.

On the facts, it is manifestly clear that the accused was caught red-handed to have in his custody or under his control the bag which contained the drug. That being the case, by reason of the provisions of s 37(d) of the Act, he shall be deemed to have in his possession the drug and to have known the nature of such drug, until the contrary is proved. Further, having regard to the quantum, by virtue of the provisions of s 37(da)(vi) he shall be pre-

sumed, until the contrary is proved, to be trafficking in the said drug. In fact, the act of carrying itself falls under the definition of 'trafficking' in s 2.

I have no reason to doubt the truth of the testimonies of the members of the police party, viz PW2, PW3 and PW6, though there are apparent differences in their evidence in respect of (i) in which hand the accused was carrying the plastic bag at the relevant time and (ii) whether the accused and PW5 were seen near the Ann Kwai Club building earlier at 7 pm that night. I regard these differences as minor differences attributable mainly to differences in recollection which do not affect their credibility. With regard to PW5, he is not an accomplice since he had made himself an agent for the prosecution before the actual commission of the offence: *Sathasivam & Ors* v *PP*.[1] There is no doubt that he is an agent provocateur. Generally, the court is always wary in accepting the evidence of an agent provocateur but in this case the legislature under s 40A of the Dangerous Drugs Act 1952 had provided that the evidence of any agent provocateur shall be admissible and treated as any other evidence from any ordinary witness. By virtue of this section, the evidence of an agent provocateur needs no corroboration to found a finding by the trial court; however, PW5 was amply corroborated by the evidence of PW2, PW3 and PW6. Hence, I found that a prima facie case had been established against the accused and called for his defence.

The accused deposed that he knew PW5 and used to meet him on several occasions in Labuan town before the night of the incident. That night he went for a walk in town with PW5. He denied carrying the plastic bag at the time of the arrest but alleged that PW5 was carrying a black plastic bag and when PW5 ran away, PW5 threw the bag to him. After the arrest, upon being assaulted by the police, he led the police party to Jalan Ranca-Ranca and to a spot near Southern Hotel where the plastic bag was alleged to have been taken but nothing was found there. In short, his defence was that he had no knowledge of the drug at all.

Having deliberated on his entire defence, I did not consider the accused person's story to be reasonably true or consistent with his innocence. The conclusion is based on these arguments. Firstly, his contention that he was not carrying the plastic bag was a mere denial having regard to the evidence of PW2, PW3, PW5 and PW6 on this point to the contrary, that is to say, he was caught red-handed to have in his custody or under his control the bag which contained the drug. Secondly, the alleged assault by the police was a bare assertion. If he really had no knowledge of the plastic bag and its contents there was no reason for him to tell the police party that the bag was taken from Jalan Ranca-Ranca and from the spot near Southern Hotel and to lead the police party to those places. By necessary implication, he must have picked up the cannabis from both or any of the said places otherwise he would not have told the police party so. This fact confirms PW5's evidence who said that he waited for the accused to fetch the cannabis. Lastly, the bag was an ordinary plastic bag which one could easily know its contents by merely opening it.

Hence, the accused had not rebutted the aforesaid statutory presumptions on the balance of probabilities. Therefore, the prosecution had proved its case beyond reasonable doubt and I found the accused guilty of the offence for which he was charged and convicted him. And I sentenced him to death.

The accused appeals.

Order accordingly.

Solicitors: *PK Lim & Co.*

Reported by *Ng Sheau Jiuan*

Ka Yin Credit & Leasing Sdn Bhd v Pang Kim Cha & Bros Development Sdn Bhd

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C23-1277-86
SHANKAR J
28 MARCH 1988

Hire Purchase – Hire purchase of bulldozer – Bulldozer destroyed by fire during currency of hire-purchase agreement – Whether agreement frustrated and hirer relieved of obligation to pay further instalments – Specific clause in agreement stipulating liability to pay rental despite damage or destruction

The first defendant took on hire purchase from the plaintiffs one bulldozer. The transaction was the subject of a formal hire-purchase agreement ('the agreement') and the first defendant took out an all-risks policy on the bulldozer in which the plaintiffs were named as owner and the first defendant's name as hirer. The policy specifically provided a provision stating that any moneys payable to the first defendant under the policy shall be paid to the plaintiffs. During the currency of the agreement, the bulldozer was destroyed by fire. The first defendant declined to pay any further instalments under the agreement until their claim against the insurers was first resolved. The plaintiffs insisted on the instalments under the agreement being paid and when this did not happen they terminated the agreement and sued for the full balance due. The senior assistant registrar refused to give the plaintiffs summary judgment and the plaintiffs appealed to the High Court.

Held, allowing the plaintiffs' appeal:

Clause 4(i) of the agreement is a complete answer to the defendant's submission. The clause states, inter alia, that 'destruction of or damage to the goods shall not discharge the hirer's liability to pay all sums due under this agreement'. Under that clause, liability to pay the full rental thus continues despite damage or destruction. Consequently, there is no defence to this claim whatsoever.